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No. 79-662

In the Supreme Court of the United States

OCTOBER TERM, 1979

HARVEY BIRDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the indictment should have been dismissed because a special attorney who participated in the grand jury investigation also made sworn statements before the grand jury.

1. An indictment returned on September 6, 1977, in the United States District Court for the Eastern District of Pennsylvania charged petitioner with nine counts of mail fraud, in violation of 18 U.S.C. 1341 and 2; 12 counts of securities fraud, in violation of 15 U.S.C. 77(q)(a) and 77x and of 18 U.S.C. 2; two counts of securities price manipulation, in violation of 15 U.S.C. 78i(a)(1), 78i(a)(2), 78j(b) and 77ff(a); one count of failure to file required securities reports, in violation of 15 U.S.C. 78p(a) and 78ff(a); and one count of

conspiracy to commit the substantive offenses, in violation of 18 U.S.C. 371. On May 23, 1978, petitioner entered a conditional plea of nolo contendere to the charges, reserving his right to appeal the denial of his motion to dismiss the indictment.[1] He was sentenced to a year's imprisonment, three years' probation, and a $100,000 fine. The court of appeals affirmed (Pet. App. A1-A33; 602 F. 2d 547).

The relevant facts pertaining to petitioner's motion to dismiss the indictment are set forth in the opinions of the courts below (Pet. App. A3-A5, A37, A39-A42). They show that from 1973 to 1975, Dennis Taylor, a senior staff attorney for the Securities and Exchange Commission (SEC), directed the SEC's investigation of Delphi Capital Corporation (Delphi) and of several other companies the stock of which was thought to have been manipulated by Delphi. One of the other companies was Uni-Shield International Corporation, of which petitioner was president. In June 1975, the SEC turned over the Delphi investigation file to the Philadelphia Strike Force of the Department of Justice for possible criminal prosecution.

Taylor was appointed a special attorney for the Justice Department, and, in that capacity, he participated in the grand jury investigation that led to the instant indictment. On August 15, 1977, Taylor made a sworn statement to the grand jury summarizing various aspects of the investigation of Uni-Shield and outlining the

[1]The plea was entered over the government's objection, pursuant to a procedure approved in *United States* v. *Zudick*, 523 F. 2d 848 (3d Cir. 1975). Compare *United States* v. *Benson*, 579 F. 2d 508 (9th Cir. 1978); *United States* v. *Swann*, 574 F. 2d 1316 (5th Cir. 1978).

proposed indictment.[2] On September 6, 1977, Taylor was questioned under oath by another attorney about how he had determined or confirmed the dates of the overt acts listed in the indictment. On at least one occasion after his August 15 appearance, Taylor examined a witness before the grand jury. Taylor also assisted in drafting the indictment, and, although he personally did not recommend return of the indictment to the grand jury, he was present when the recommendation was made.[3]

2. Relying on *United States* v. *Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978), and *United States* v. *Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979), petitioner contends (Pet. 7-10) that dismissal of the indictment is required because Taylor testified before the grand jury.[4] However, petitioner's reliance on those cases is misplaced for several reasons.

First, those decisions are largely based on a misinterpretation of Fed. R. Crim. P. 6(d), which provides:

[2]On November 17, 1976, Taylor read to the grand jury the testimony a witness had previously given before an expired grand jury. On that occasion, however, Taylor was not sworn, and petitioner does not take issue with that appearance. See Pet. App. A4 n.1.

[3]The indictment was returned on September 6, 1977, after Taylor's appearance of that date. No witnesses testified after Taylor on that occasion.

[4]The district court found that, because Taylor (although under oath) had done nothing more than summarize evidence previously presented to the grand jury and explain the indictment, he was in reality acting as an attorney rather than a witness (Pet. App. A40-A41). The court of appeals noted the district court's conclusion, but nonetheless accepted for purposes of discussion petitioner's characterization of Taylor as a witness (Pet. App. A8 & n.8). Although we do not endorse the practice of a prosecutor's making sworn statements to the grand jury, we agree with the district court's assessment of Taylor's role.

> Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

The *Treadway* court reasoned that an attorney for the government who testifies before the grand jury becomes subject to the limitations applicable to a witness under Rule 6(d) and can therefore be present only during his own testimony. Thus, if he remains after testifying, a government attorney becomes an unauthorized person whose presence, the court further reasoned, requires dismissal of the indictment. 445 F. Supp. at 962, citing *United States* v. *Echols*, 542 F. 2d 948, 951 (5th Cir. 1976), cert. denied, 431 U.S. 904 (1977); *Latham* v. *United States*, 226 F. 420 (5th Cir. 1915); and *United States* v. *Braniff Airways*, 428 F. Supp. 579, 582-583 (W.D. Tex. 1977). See also *United States* v. *Phillips Petroleum Co.*, 435 F. Supp. 610, 618 (N.D. Okla. 1977). The *Gold* court accepted this interpretation of Rule 6(d) as well (470 F. Supp. at 1351), but its conclusion that the indictment must be dismissed was based at least in part on what it found to be a number of prosecutorial improprieties and the "totality of grand jury abuse" (*id.* at 1356)

Although the court of appeals did not condone Taylor's conduct in this case, it fully explained the defect in the rationale of the *Treadway* decision and petitioner's argument herein—that dismissal of the indictment is automatically required by Rule 6(d) if a lawyer for the government remained in the grand jury room after testifying as a witness:

> [T]he question whether to adopt this sanction of dismissal does not arise until it has been established that the alleged intruder filled none of the authorized roles listed in Rule 6(d). Here the whole * * * dilemma arises not because a person fit none of the listed roles, but because one person allegedly played two of those roles: both "attorney for the government" and "witness under examination." After that person withdrew from the witness stand, * * * he ought to have withdrawn also from his role as "attorney for the government," to avoid any appearance of professional impropriety. But a professional impropriety does not work a methaphysical dissolution of his actual status as government counsel: the many cases in which trial courts have permitted testifying advocates to continue their participation at trial demonstrate that their testimony could not by itself deprive them of legal authority to represent their clients. Nothing in the plain language of Rule 6(d) or in its legislative history indicates that the rule was intended to have such an effect; the Rule's concern is to exclude persons with no authorized roles, not to implement the profession's proscriptions against conflicting roles. In sum, * * * Rule 6(d) does not prevent such conduct as a matter of law.

Pet. App. A20-A21 (footnote omitted).[5]

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[5]The court observed (Pet. A22-A23 & n.48) that where an indictment is otherwise supported by the evidence, dismissal on the basis of governmental misconduct in an exercise of the court's supervisory power is a sanction that should rarely be used. Indeed, even where there are allegations that the evidence before the grand jury was insufficient or incompetent, there is some question whether dismissal would ever be appropriate. See, *e.g.*, *Costello* v. *United States*, 350 U.S. 359 (1956). Because, in the present case, there was

Moreover, there was a probability of prejudice in *Treadway* and *Gold* that is absent in the present case. The prosecutor in *Treadway* provided independent substantive evidence needed to prove a material element of the offense charged in the indictment. 445 F. Supp. at 960, 964.[6] Similarly, the attorney for the government in *Gold* "gave important, material and essential testimony to the grand jury." 470 F. Supp. at 1347. Here, by contrast, Taylor's "testimony added no new material evidence" and, "[a]lthough the testimony summarizes contestable substantive evidence, it focuse[d] primarily on the structure of the proposed indictment" (Pet. App. A25; see also Pet. App. A40-A41). As the court of appeals found, "this testimony could not 'have had independent material significance in the jurors' minds when they considered whether they wanted to indict [petitioner]' " (Pet. App. A26, quoting *United States* v. *Bruzgo*, 373 F. 2d 383, 386 (3d Cir. 1967)). These fact-bound determinations by the courts below do not warrant review by this Court. And "because here it is possible to ascertain that no actual prejudice to [petitioner] could have resulted from the prosecutor's testimony" (Pet. App. A26), petitioner is not entitled to dismissal of the indictment, even assuming arguendo that he would be if there had been a real risk of prejudice from the prosecutor's conduct.

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no showing that Taylor's conduct "was anything but an isolated incident unmotivated by sinister ends" or "that the practice of prosecutorial testimony ha[d] become so entrenched and flagrant in this Circuit as to require a prophylactic rule of dismissal," the court declined to impose such a rule in this case in the absence of a showing of prejudice (Pet. App. A24).

[6]The defendant in *Treadway* also alleged that the prosecutor's testimony was inaccurate in several respects. Petitioner alleges no inaccuracies in Taylor's testimony, and the court of appeals determined that "the testimony was phrased in neutral terms, without possibility for inflammatory effect" (Pet. App. A26).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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